83-336

No.

Office Supreme Court, U.S.
FILED
AUG 30 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

MAINTENANCE CONTRACTORS, INC.,
Petitioner,

vs.

PATRICIA HARRIS, Secretary of the U.S. Department of Housing and Urban Development,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

1. Is an action in equity for unjust enrichment and equitable lien against the Secretary of Housing and Urban Development in reality against the General Insurance Fund in control of the Secretary yet barred by the six year statute of limitations 28 U.S.C. 2401(a) as an action against the United States?

2. Is a cosmetic fraud based on niceties of the contractual arrangements constructed by the Department of Housing and Urban Development in a 12 U.S.C. 17151(d)(3) transaction such a factual concealment as to toll the statute of limitations until such time as it was first judicially decided thus bringing it within the ambit of the "due-diligence discovery" rule of accrual or cause of action?

3. Is there an acknowledgement of a debt, that tolls the Statute of Limitations, where the United States forecloses on the basis of being an Assignee of a lender and is thereby contractually bound to defend Mechanic's Lien claims, fails to reply to the counterclaim of the contractor, but instead enters into a judgment order that the contractor is entitled to proceeds of the Marshal's sale on its Mechanic's Lien counterclaim?

PARTIES

The Petitioner to this action is:

MAINTENANCE CONTRACTORS, INC.

The Respondent to this action is:

PATRICIA HARRIS, SECRETARY OF THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

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No.

In the Supreme Court of the United States

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MAINTENANCE CONTRACTORS, INC.,
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To the United States Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals, unreported, and the opinion rendered by the District Court for the Northern District of Ohio, Eastern Division, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 1, 1983. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, 28 U.S.C. 2401(a), and Ohio R.C. § 2305.14 all appear in the Appendix hereto.

STATEMENT OF THE CASE

The Alhambra Apartments was a multifamily residential dwelling owned by the St. Matthew Management Corporation, a nonprofit corporation, and located in the City of Cleveland, Ohio. In 1968, St. Matthew began a major rehabilitation of the building, contracting with Petitioner, Maintenance Contractors, Inc., for construction services. In order to finance this work St. Matthew and its lender, the Cleveland Trust Company, sought and received a commitment for federal mortgage insurance from the Secretary of Housing and Urban Development, pursuant to Section 221d(3) of the National Housing Act, 12 U.S.C. Section 17151(d)(3). For federal mortgage insurance purposes, the project was designated FHA Project No. 042-35010-EC-NP-SUP.

St. Matthew, the owner, subsequently defaulted on its construction contract and work was terminated in 1970 when the contract was approximately 90% completed. The lender then assigned the mortgage to the Secretary of HUD, pursuant to the terms of the mortgage insurance contract, on October 13, 1970. Foreclosure on the property ensued in 1971, which resulted in a deficiency judgment against St. Matthew. Petitioner realized nothing on its lien claim. Title to the property was granted to the Secretary in 1973.

Petitioner, Maintenance Contractors, claimed it had not been paid $181,454.37 which was due as a result of the breach of the contract with St. Matthew, insured by HUD. A Mechanic's Lien in that amount was placed by Petitioner against the property. Petitioner filed the instant action to recover the amount due on April 27, 1979, claiming on an equitable basis, quantum meruit and unjust enrichment, against the Secretary in her official capacity for retainages and undisbursed mortgage proceeds to be paid from the General Insurance Fund.

The District Court dismissed the complaint on the ground that the action was not commenced within six years after the cause of action accrued, on the basis that this was an action against the United States and 28 U.S.C. 2401(a), barred the action, in that it was not brought within six years from the date of accrual, October 13, 1970.

Petitioner, at all times has contended that the six year Statute of Limitations was inapplicable, based in part on equitable considerations as stated in *Holmberg v. Armbrecht*, 327 U.S. 392 (1945) at 397:

> . . . that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Petitioner has contended, based on equitable principles that the cosmetic fraud based on the niceties of the contractual arrangements constructed by HUD, Petitioner had no way of knowing that it had such right of action against HUD, until the decision in the case of *Trans-Bay*

Engineers and Builders, Inc. v. Hills, 551 F.2d 370, decided December 30, 1976. See page 382.

Petitioner, in the foreclosure action by the United States, counterclaimed against St. Matthew, asserting it had not been paid $181,454.37, evidenced by a Mechanic's Lien it had filed against St. Matthew. St. Matthew failed to answer. The United States who had succeeded to the rights of the lender, Cleveland Trust Company, did not contest the Mechanic's Lien in the counterclaim, though as assignee of the mortgage, it was its contractual duty to do so. Instead it took a default judgment against St. Matthew, acknowledging in the judgment order that upon Marshal's sale, Maintenance Contractors was in fact entitled to payment from the proceeds thereof, after HUD was paid its mortgage indebtedness.

Petitioner has asserted this was an acknowledgement of Petitioner's claim by virtue of the judgment order and, since under the Federal Rules of Civil Procedure the counterclaim of Maintenance Contractors is admitted unless specifically denied by Reply. If the foregoing is deemed an acknowledgement of a debt, then under the law the Statute of Limitations would start to run from the date of the acknowledgement and not be barred by 28 U.S.C. 2401(a).

Apparently, neither the United States nor the Petitioner knew of any legal rights that existed in reference to the contracts based on the contractual relations between and among the parties, whereby HUD could be deemed the alter ego of St. Matthew Management Corporation.

Petitioner urged the District Court and the Court of Appeals to adopt and apply the "due-diligence discovery" rule of accrual cause of action followed in the Sixth Circuit in the case of *N.L.R.B. v. Allied Products Corp.*, 548 F.2d 664, 650 (6th Cir. 1977), and *N.L.R.B. v. Don Burgess Construction Corp.*, 596 F.2d 378. These cases

hold that where there is a fraudulent concealment, the Statute of Limitations is tolled until the claimant discovers or in the exercise of reasonable diligence should have discovered the acts constituting the fraudulent concealment.

Petitioner has maintained throughout that the contractual relations between and among the parties all on HUD's forms, purported to make HUD solely an insurer in the transactions and in no way could they be deemed an alter ego of the St. Matthew Management Corporation, except by a judicially created right that did not exist prior to the *Trans-Bay Engineers and Builders, Inc. v. Hills, supra.* This is especially true in that Petitioner was entitled to rely on the presumption of law that the acts of the Secretary of HUD were regular and correct until the contrary was shown.

Petitioner has maintained that the Statute of Limitations, 28 U.S.C. 2401(a) does not apply, since this is an action against the Secretary of Housing and Urban Development and not against the United States, based on the case of *Industrial Indem., Inc. v. Landrieu,* 615 F.2d 644 (5th Cir. 1980), which held at pages 646 and 647:

> For Industrial Indemnity's claim to be against the Secretary, and, therefore, within the scope of the "sue and be sued" clause, as opposed to a suit against the United States that could not be brought in federal district court, any judgment for the plaintiff must be recoverable from funds in the possession and control of the Secretary that are severed from Treasury funds and Treasury control.
>
> We find that the present suit is against *the Secretary of Housing and Urban Development, and not against the United States.* A judgment against the

> Secretary establishing plaintiff's entitlement can be paid out of money in the General Insurance Fund that is a separate fund in the control and possession of the Secretary. (Emphasis added.)

Concomitant therewith, Petitioner's counsel suggested to the Court of Appeals in oral argument that the Ohio State Statute of Limitations, R.C. 2305.14 would be controlling equitable actions such as this. Clearly this is a legitimate argument for Petitioner to show that 28 U.S.C. § 2401(a) is inapplicable, Petitioner having no burden to establish a Statute of Limitations.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS AND IS A DEPARTURE FROM THE SIXTH CIRCUIT'S BODY OF LAW ON THE ISSUE.

The Sixth Circuit decision in the case at bar is in conflict with the Second Circuit case *S. S. Silberblatt, Inc. v. East Harlem Pilot Block,* 608 F.2d 28 (1979) and the Fifth Circuit case, *Industrial Indem., Inc. v. Landrieu, supra,* which has held that the Petitioner's case involving 12 U.S.C. § 17151(d) is a case against the Secretary of Housing and Urban Development and the special risk insurance fund under the Secretary's possession and control.

The Sixth Circuit has departed from its due diligent discovery rule of accrual of action. In making its departure it has employed the device of not recommending its order for full text publication thereby creating the appearance in the published law that no departure has occurred, and thereby created the impression in the Petitioner that it has applied a special law to it, out of the ordinary and regular law, that would be generally applied to Petitioner's claim denying Petitioner due process under the Fifth Amendment to the Constitution.

II. PETITIONER HAS HAD ITS PRIVATE PROPERTY TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION, WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The federal courts below have shielded the government from the claim of the Petitioner by the use of an

inapplicable Statute of Limitations. The Petitioner has given the HUD sponsored project with St. Matthew Management Corporation, a company with de minimis equity and no liability in the project, $181,000.00 worth of labor, materials and services for which it has not been paid. Petitioner, in good faith, under adverse circumstances implemented HUD's public project and enriched HUD by $181,000.00 of its labor, materials and services. The project was 90% complete, when St. Matthew decided to cancel the project. Under these circumstances Petitioner was denied the right to complete the project and was denied compensation for labor, materials and services performed on the project by HUD's alter ego, St. Matthew.

This project, in foreclosure was purchased by HUD by their bid of $1,021,000.00, when HUD actually expended $910,507.00 in mortgage disbursement funds. It is clear that HUD received the benefit of Petitioner's labor, materials and services and was enriched, thereby resulting in a taking of Petitioner's private property for public use, without just compensation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Order of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 1, 1983)

No. 81-3632

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAINTENANCE CONTRACTORS, INC.,
Plaintiff-Appellant,

v.

PATRICIA HARRIS, in her Official Capacity as Secretary of the U. S. Dept. of Housing and Urban Development,
Defendant-Appellee.

ORDER

Before: JONES and WELLFORD, *Circuit Judges;* WEICK, *Senior Judge.*

Appellant Maintenance Contractors, Inc. (Maintenance) entered into a construction contract on March 28, 1968, with St. Matthew Management Corporation (St. Matthew), to perform work on an apartment project in Cleveland, Ohio, owned by St. Matthew. St. Matthew obtained financing from Cleveland Trust Company (Lender), with a mortgage given to the Lender. The mortgage was insured and guaranteed by the Department of Housing and Urban Development (HUD) pursuant to 12 U.S.C. § 1715 (d)(3).

St. Matthew, the owner, subsequently defaulted on its construction contract and work was terminated in 1970 when the contract was approximately 90% completed. The lender then assigned the mortgage to the Secretary of HUD, pursuant to the terms of the mortgage insurance contract, on October 13, 1970. Foreclosure on the property [2] ensued in 1971, which resulted in a deficiency judgment against St. Matthew. Appellant realized nothing on its lien claim. Title to the property was granted to the Secretary in 1973.

Appellant Maintenance claimed it had not been paid $181,454.37 which was due as a result of the breach of the contract with St. Matthew, insured by HUD. A mechanics lien in that amount was placed by appellant against the property. Appellant filed the instant action to recover the amount due on April 27, 1979, claiming an equitable basis, quantum merit or unjust enrichment, against the Secretary in her official capacity.

Appellee filed a motion in the district court to dismiss the complaint on the ground that the action was not commenced within six years after the cause of action accrued, under 28 U.S.C. § 2401(a). That statute provides:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.[1]

---

1. This statute has subsequently been amended to state: "Except as provided by the Contract Disputes Act of 1978, every civil action . . ." The Contract Disputes Act is contained in 41 U.S.C. § 601 *et seq.*, and provides for procedures, including review by the Board of Contract Appeals, for contracts entered into by an executive agency for the procurement of services, construction, etc." It is effective with respect to contracts entered into 120 days after November 1, 1978, and at the election of the contractor, for claims pending before the contracting officer. The amendment is not applicable or relevant to the issues in this case.

[3] The district court found that the cause of action arose on October 13, 1970, and was not commenced within the six-year period, thus the claim was barred under 28 U.S.C. § 2401(a). The court also found that there was no subsequent acknowledgement of a previous debt and promise to pay by the Secretary as contended by appellant. The court noted that statutes of limitation are applied to actions in equity as well as actions at law, and thereby dismissed the complaint. We agree.

Appellant Maintenance thereafter filed a motion to vacate the order of dismissal, arguing that the cause of action did not accrue until appellant learned of the holding in *Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976), which was decided on December 30, 1976. Appellant contended that the first time it could have known that HUD could be held liable as it was in 1976 although suit was not filed until 1979. This argument was apparently rejected by the district court. Appellant now appeals the dismissal of the complaint, and raises for the first time, on oral argument, the contention that a ten year Ohio statute of limitations would apply, not the federal statute upon which the trial court relied.

Appellant also argues in its appellate brief that its complaint was filed against the Secretary of HUD and not against the United States, and that therefore the six-year statute of limitations would not apply, relying upon *Industrial Indemnity, Inc. v Landrieu*, 615 F.2d 644 (5th Cir. 1980).

[4] The appellant's reliance on *Indemnity* is misplaced. In that case, the court recognized a distinction between the Secretary of HEW and the United States for the purposes of assessing whether sovereign immunity barred suit. There is no suggestion in that case, or in the language

or history of § 2401, which would suggest that the distinction is relevant with regard to a statute of limitations issue. Further, this issue, as well as the issue as to whether the ten-year Ohio statute of limitations applies, were not raised in the district court and will not be considered here on appeal. *Madison v. Wood,* 410 F.2d 564 (6th Cir. 1969).

In respect to the contention that appellant first learned of its asserted equitable right to relief in 1976 in the *Trans-Bay* case, it is clear that appellant was fully aware, or should have been aware, of all the contract documents pertinent to its claim during the 1971 foreclosure litigation. There was no concealment of any of the elements of the asserted claim, and appellant was, or should have been, knowledgeable about the circumstances of the project and the relationship between St. Francis and H.U.D. in 1970 and 1971. No claim of any kind except the asserted lien against St. Francis was made at that time by appellant. There is no suggestion that the appellant did not know of the *facts* underlying its claim; rather that it was not aware of any judicial decision recognizing the claim until 1976. As far as we have been able to determine, no case has applied the "due diligence" exception to the statute of limitations in cases in which there is an alleged change **[5]** of *law* which gives rise to the new "knowledge" that could not have been discovered by due diligence. *See Neely v. United States,* 546 F.2d 1059 (3rd Cir. 1976). There, the underlying fact which was not discovered even through due diligence was that a criminal conviction was invalid under a new legal theory. The case in which the statute of limitations was tolled, however, was not that criminal case, but a civil case to reclaim the fines there collected.

Furthermore, there were earlier cases cited by the *Trans-Bay* court as authority for its decision, which were

decided in 1975 and early 1976 so that it cannot be claimed by appellant that this was a brand new and unforeseeable consequence of a chain of events similar to the facts which occurred in that case *sub judice*. It should be pointed out, moreover, that *Trans-Bay* involved a Section 236 project under the National Housing Act (12 U.S.C. § 1752-1) which has not been demonstrated by appellant to have been the same type of Housing Project involved here, described by appellant as a "rehabilitation project" in its complaint.

Appellant never presented its claim that an Ohio ten-year limitation period applied in this case to the district court. It cited no authority to the effect that such a statute applied to a federally insured project against the H.U.D. Secretary. This argument will not be considered by this court under these circumstances.

[6] Finally, there is no merit to appellant's contention that somehow appellee acknowledged the debt during the proceedings involving foreclosure and transfer of title in the project to H.U.D. Appellant was named a party in that proceeding because it had filed a mechanic's lien against St. Matthew and the subject property. As found by the district court, nowhere in this record is there any "unqualified and direct admission" by appellee that it owed any debt to appellant, nor is there acknowledgement by H.U.D. of any responsibility to pay the mechanic's lien. *Huntington Steel Corp. v. U. S.*, 153 F. Supp. 920, 923 (S.D.N.Y. 1957); *Hellenic Lines, Limited v. U. S.*, 345 F. Supp. 1385, 1389 (S.D.N.Y. 1972). It would require clear expression by appellee to this effect in the face of the express agreement by appellant that it would file no mechanic's or other such claim against the building and improvements and real estate appurtenant thereto on account of any work or labor done. (See Article 6 - Waiver of Mechanics' Liens - in the Cost Plus Construction Contract between appellant

and St. Matthew). No such showing was made by appellant.

For these reasons, judgment for appellee is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: June 23, 1983

COSTS: None

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed August 12, 1981)

C79-784

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAINTENANCE CONTRACTORS, INC.
Plaintiff,

vs.

PATRICIA HARRIS, In Her Official Capacity as Secretary of the Department of Housing and Urban Development,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court upon defendant's motion to dismiss plaintiff's complaint pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure. In this action, plaintiff seeks to recover certain amounts which plaintiff filed in the form of a Mechanics Lien for work performed on "FHA" project number 042-35010-EC-NP-SUP. The financing for this apartment rehabilitation project was insured by the defendant and upon certain defaults by the owner, such mortgage was subsequently assigned to the defendant.

For all that appears in the complaint, the cause of action arose on October 13, 1970 and on April 27, 1979, plaintiff filed the lawsuit in United States District Court

for the Northern District of Ohio. The defendant now moves to dismiss the complaint on the ground that the action was not commenced within six (6) years after plaintiff's right of action accrued pursuant to 28 U.S.C. §2401 (a).

Section 2401 (a) of Title 28 U.S.C.A. provides as follows:

> "**[2]** Time for commencing action against United States.
>
> "Every civil action commenced against the United States shall be barred unless the complaint is filed within six (6) years after the right of action first accrues. . ."

In the light of this foregoing principal with respect to the jurisdictional prerequisites of suit against the government, it does not appear that this action is within the six (6) year period. The plaintiff, however, contends that there has been a tolling of the statutes by reason of the government acknowledging the validity of the plaintiff's contract claim on April 30, 1973. On that date, the United States filed a motion for Default Judgment in an action against the owner of the apartment project.

The requirements in reference to acknowledgment should contain an unqualified and direct admission of a previous debt and express a willingness to pay it. *Huntington Steel Corporation v. United States,* 153 F. Supp. 920, 923 (S.D.N.Y. 1957). As a matter of record, nowhere in the motion of April 30, 1973 did the defendant promise to pay the plaintiff's mechanics lien. Hence, in the opinion of this court, there has been no acknowledgment.

The plaintiff further asserts that five of its claims for relief are equitable and thus not governed by statutes of limitation. However, it is well settled that whenever the courts of law and equity possess concurrent jurisdiction to

enforce a claimant's right, statutes of limitation are to be as forcefully applied in equity as at law. *Saffron v. Department of the Navy*, 561 F. 2d 938, 942 (D.C. Cir. 1977). Also see *Madison v. Wood*, 410 F. 2d 564 (6th Cir. 1969), **[3]** and *Oppenhiem v. Campbell*, 571 F.2d 660 (D.C. Cir. 1978).

Consequently defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed August 13, 1981)

C79-784

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAINTENANCE CONTRACTORS, INC.
Plaintiff,

v.

PATRICIA HARRIS, etc.,
Defendant.

ORDER

Upon the Court's Memorandum and Order filed August 12, 1981,

IT IS ORDERED that plaintiff's complaint is hereby dismissed.

/s/ GEORGE W. WHITE
United States District Judge

CONSTITUTION AND STATUTE INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 U.S.C. § 2401(a)

§ 2401. Time for commencing action against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond

the seas at the time the claim accrues may be commenced within three years after the disability ceases. Amended November 1, 1978.

Ohio Revised Code § 2305.14

2305.14. For other relief.

An action for relief not provided for in sections 2305.04 to 2305.131, inclusive, and section 1304.29 of the Revised Code, shall be brought within ten years after the cause thereof accrued. This section does not apply to an action on a judgment rendered in another state or territory.